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<b>R.V., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 16-0182</b>
	)	<b>Issued: June 15, 2016</b>
<b>DEPARTMENT OF HOMELAND SECURITY,</b>	)	
<b>CUSTOMS &amp; BORDER PROTECTION,</b>	)	
<b>MARCH AIR FORCE BASE, CA, Employer</b>	)	
	)	

### Case Submitted on the Record

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge

On November 10, 2015 appellant filed a timely appeal from an October 29, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

The issue is whether appellant met his burden of proof to establish an emotional condition causally related to factors of his federal employment.

On May 14, 2014 appellant, then a 48-year-old aviation enforcement agent, filed an occupational disease claim (Form CA-2) alleging that on April 8, 2014 he was placed in

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

administrative function due to his inability to perform his assigned law enforcement duties. He noted that he first became aware of his condition and its relation to his federal employment on April 8, 2014. The employing establishment advised that appellant was currently working administrative tasks due to his medical condition. It noted that he did not stop work, but his duties were changed.

By letter dated May 29, 2014, OWCP notified appellant that the evidence of record was insufficient to establish his claim. It instructed him to complete a detailed questionnaire regarding the factual elements of his claim and advised him of the type of medical evidence needed.

In an April 10, 2014 letter, the employing establishment informed appellant that his law enforcement status was suspended pending further review of his medical conditions. It noted that he was experiencing a number of physical ailments that limited his capacity to effectively and safely perform his assigned duties. Appellant was assigned to an administrative position.

In an April 27, 2014 report, Dr. Daniel Camarillo, a family practitioner, advised that appellant had multiple medical problems including Hepatitis B, hypertension, coronary artery disease, type 2 diabetes, and a prior stroke. He noted that appellant had significant challenges that prevented him from performing the physical demands of his position and cognitive challenges as a result of his stroke. Dr. Camarillo recommended that appellant retire from the employing establishment. Appellant submitted several other diagnostic reports including stress echo studies and liver function tests

In a June 10, 2014 response to the OWCP questionnaire, appellant advised that his stress began in 2005 with the closure of the Livermore Sector, Fresno Station. He noted that his reassignment to the Temecula Border Patrol Station, in a different part of California, disrupted his and his family's lives and caused him stress. Appellant noted that he put in for many federal jobs in the Fresno area, but was denied a position. He indicated that either the stress of relocating or the stress of arresting illegal aliens contributed to him having a heart attack. Appellant noted that, in September 2008, he transferred to a less stressful job at the employing establishment where he had a stroke in February 2009. He noted that his stroke weakened his communication and writing skills. Appellant indicated that in a yearly evaluation he was told that he needed to improve his speaking and writing skills. He contended that he had been dealing with stress regarding his reduced language skills since his stroke. Appellant also noted that he was diagnosed with Hepatitis B in 2005, which resulted in a quick decline in his health which coupled with other stressful situations made him susceptible to other chronic diseases including type 2 diabetes, high blood pressure, stroke, and heart attack.

On June 17, 2016 OWCP sent a letter of inquiry to the employing establishment asking a series of questions relative to his employment, abilities, and any accommodations given. In a response received August 15, 2014, appellant's supervisor provided a statement indicating that he was unaware of appellant's stress-related issues. He did state that appellants function post stroke was lacking and that college classes were made available to him. Further, the supervisor noted that there was never a request for accommodations.

In an August 8, 2014 attending physician's report (Form CA-20), Dr. Camarillo advised that appellant had several medical conditions including Hepatitis B, heart attack, type 2 diabetes, and speech deficits due to a stroke. When asked if the conditions were caused or aggravated by an employment activity he responded "no."

In a statement received January 20, 2015, inquired about the status of his claim. He advised that he filed an Equal Employment Opportunity (EEO) complaint against the employing establishment alleging that it retaliated against him following his stroke.

In an undated letter to appellant, the employing establishment advised that it was closing the Livermore Sector where he worked, effective July 31, 2004 in order to more efficiently and effectively perform its mission. It advised that he was entitled to priority for any position with the employing establishment within in the local commuting area.

In a February 19, 2015 statement, Raul Diaz, a former coworker of appellant, advised that he has known appellant since 1997. He noted that appellant's position as the acting patrol agent in charge was stressful. Mr. Diaz indicated that the Fresno Sector closed causing employees to be relocated. He alleged that although the employing establishment stated that employees would have priority for positions that opened in the area, appellant was not hired and was forced to relocate to Temecula. Mr. Diaz advised that appellant had to leave his family behind for a year, eventually moving his family to Temecula after failing to secure a position in Fresno. He noted that, following a stroke, appellant related that his supervisors and coworkers were messing with him, questioning him on his actions at work, making fun of his speech, and passing around drawings to make fun of him. Mr. Diaz also indicated that appellant's gun and credentials were taken from him with no explanation which caused him more stress.

In a February 25, 2015 statement, Steven Munoz, appellant's former coworker, advised that he worked with appellant at the Border Patrol Station in Fresno. He noted that when the Livermore Section was closed, agents were given 30 days to either uproot from their established homes or risk losing their jobs. Mr. Munoz indicated that this caused appellant a great deal of stress given the fact that his wife would have to leave her job, he would have to sell his home, and his children would have to leave school. He noted that appellant began to deteriorate physically and mentally as he missed his family when he relocated to Temecula. Mr. Munoz advised that appellant sustained a heart attack and then transferred to a different division of the employing establishment where he later had a stroke and was diagnosed with diabetes. He noted that appellant suffered both mentally and financially due to the closure of the Livermore Sector.

By decision dated June 2, 2015, OWCP denied the claim because the evidence of record failed to establish that appellant sustained an emotional condition due to compensable work factors.

On July 27, 2015 appellant requested reconsideration. In a July 27, 2015 statement, he advised that he was stress free in his position until 2004 when he was told that he had three months to move to Temecula because the Livermore section was being closed. Appellant noted that he had to spend a year away from his family while in Temecula. He advised that in tested possible for Hepatitis B, which was accepted as work related. Appellant indicated that his position required him to deal with dead bodies, smugglers, and accidents. He contended that he

continued to suffer from stress in his position, which caused high blood pressure eventually leading to a heart attack in 2007. Appellant noted that he moved to the air and marine side of the employing establishment, but his stress grew resulting in a stroke, which reduced his critical thinking skills. He alleged that he was belittled, bullied, and verbally abused by supervisors and coworkers. Appellant also alleged that his HIPAA rights were violated when a supervisor spread around the office that he was losing his skills.

By decision dated October 29, 2015, OWCP denied modification of its prior decision.

On appeal, appellant argues that the allegations he made were truthful and that it would be impossible for him to produce the evidence required.

### **LEGAL PRECEDENT**

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or an illness has some connection with the employment, but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to his or her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA.<sup>2</sup> On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or his or her frustration from not being permitted to work in a particular environment or to hold a particular position.<sup>3</sup>

To establish a claim that he or she sustained an emotional or stress-related condition in the performance of duty, an employee must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to the condition; (2) medical evidence establishing that he or she has an emotional or stress-related disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to the condition. If a claimant implicates a factor of employment, OWCP should determine whether the evidence of record substantiates that factor. Allegations alone are insufficient to establish a factual basis for an emotional condition claim and must be supported with probative and reliable evidence. If a compensable factor of employment is established, OWCP must then base its decision on an analysis of the medical evidence.<sup>4</sup>

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employing establishment rather than the regular or specially assigned work duties of the employee and are not covered under FECA.<sup>5</sup> However, the Board has held that where the evidence establishes error or abuse on the part of the

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<sup>2</sup> *Supra* note 1; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>3</sup> *Gregorio E. Conde*, 52 ECAB 410 (2001).

<sup>4</sup> *G.S.*, Docket No. 09-764 (issued December 18, 2009).

<sup>5</sup> *See Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

employing establishment in what would otherwise be an administrative matter, coverage will be afforded.<sup>6</sup> In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.<sup>7</sup>

For harassment or discrimination to give rise to a compensable disability under FECA, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.<sup>8</sup> A claimant must establish a factual basis for his or her allegations with probative and reliable evidence. Grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.<sup>9</sup> The issue is whether the claimant has submitted sufficient evidence under FECA to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.<sup>10</sup> The primary reason for requiring factual evidence from the claimant in support of her allegations of stress in the workplace is to establish a basis in fact for the contentions made, as opposed to mere perceptions of the claimant, which in turn may be fully examined and evaluated by OWCP and the Board.<sup>11</sup>

### ANALYSIS

Appellant filed an occupational disease claim alleging that he sustained an emotional condition as a result of being transferred to a new duty location. He also cited being denied for a position in the Fresno area, being placed on administrative duty, retaliation after a stroke, bullying, and a violation of his HIPAA rights. OWCP denied appellant's emotional condition claim, finding that he failed to establish any compensable employment factors. The Board must therefore initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of FECA. Appellant alleged that he experienced stress as result of his job duties including dealing with dead bodies, smugglers, and accidents. He failed to submit factual evidence identifying particular tasks on specific dates to which he attributes his emotional condition. The Board finds that this claim is vague and lacking in detail and therefore it does not allege a compensable factor of employment. The Board notes that appellant's allegations do not sufficiently identify specific work factor or conditions to implicate work factors under *Cutler*.<sup>12</sup>

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<sup>6</sup> See *William H. Fortner*, 49 ECAB 324 (1998).

<sup>7</sup> *Ruth S. Johnson*, 46 ECAB 237 (1994).

<sup>8</sup> See *Michael Ewanichak*, 48 ECAB 364 (1997).

<sup>9</sup> See *Charles D. Edwards*, 55 ECAB 258 (2004); *Parley A. Clement*, 48 ECAB 302 (1997).

<sup>10</sup> See *James E. Norris*, 52 ECAB 93 (2000).

<sup>11</sup> *Beverly R. Jones*, 55 ECAB 411 (2004).

<sup>12</sup> See *supra* note 3.

Appellant alleged that the closing of the Livermore Section and his subsequent change in duty station caused him stress. Although the handling of job transfers and the management of work assignments and schedules are generally related to the employment, they are administrative functions of the employing establishment and not duties of the employee.<sup>13</sup> An employee's emotional reaction to administrative or personnel matters taken by the employing establishment is not covered under FECA absent a finding of error or abuse by it as such matters pertain to procedures and requirements of the employing establishment and do not bear a direct relation to the work required of the employee.<sup>14</sup> The Board finds that appellant has not presented any evidence of error or abuse in the part of the employing establishment with respect to its handling of the above-noted administrative and personnel matter.<sup>15</sup>

Appellant also alleged that the employing establishment failed to hire him for several positions that would have allowed him to stay in the Fresno area. He submitted a letter from the employing establishment that indicated that he was entitled to priority for any position within in the local commuting area. However, the Board has held that conditions resulting from the desire for a different job, promotion, or transfer are not compensable.<sup>16</sup> As noted, frustration from not being permitted to work in a particular environment is not compensable.<sup>17</sup>

In a response to OWCP on August 14, 2014 appellant's supervisor indicated that he was unaware of appellant's stress issues. As such no request for accommodation was requested. Appellant's supervisor noted that appellant's post stroke was lacking, but he performed all tasks assigned.

Appellant submitted an April 10, 2014 letter from the employing establishment notifying him that he was being placed on administrative duty due to physical ailments that limited his capacity to effectively and safely perform his assigned duties. He contended that this caused him stress. The letter indicated that appellant admitted that his physical ailments did in fact limit his capacity to perform his duties. Furthermore, he submitted an April 27, 2014 report where Dr. Camarillo recommended that he retire from the employing establishment due to his multiple health conditions. The Board has held that the manner in which a supervisor exercises his or her discretion falls outside the coverage of FECA. This principal recognizes that supervisors or managers must be allowed to perform their duties and that employees will at times disagree with actions taken. Mere disagreement with or dislike of actions taken by a supervisor or manager will not be compensable absent evidence establishing error or abuse.<sup>18</sup> There is insufficient evidence to show that appellant's supervisor acted unreasonably toward appellant with regard to

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<sup>13</sup> *L.C.*, 58 ECAB 493 (2007).

<sup>14</sup> *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

<sup>15</sup> *See Charles D. Edwards*, 55 ECAB 258 (2004); *Linda K. Mitchell*, 54 ECAB 748 (2003); *James E. Norris*, 52 ECAB 193 (2000). *See also Andrew J. Sheppard*, 53 ECAB 170 (2001) (an employee's frustration and depression resulting from an involuntary transfer are not compensable).

<sup>16</sup> *Charles E. McAndrews*, 55 ECAB 711 (2004).

<sup>17</sup> *See supra* note 4.

<sup>18</sup> *Linda J. Edwards-Delgado*, 55 ECAB 401 (2004).

placing him on administrative duty.<sup>19</sup> Appellant also alleged that he experienced stress as a result of being told that he needed to improve his speaking and writing skills in a performance appraisal. The Board has held that an unsatisfactory performance rating, without more, is insufficient to provide coverage under FECA.<sup>20</sup> Although the performance rating is related to the employment, it is an administrative function of the employing establishment, not a duty of the employee. There is no evidence of error or abuse by the employing establishment with respect to this incident.

Appellant alleged that his coworkers and supervisor were verbally abusive and bullied him regarding his speech following his stroke. The Board has recognized the compensability of physical threats or verbal abuse in certain circumstances. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under FECA.<sup>21</sup> The Board finds that appellant has not sufficiently identified particulars of any events in which he alleges verbal abuse.<sup>22</sup>

To the extent that appellant alleges that he was harassed or discriminated against, the Board has held that, to give rise to a compensable disability under FECA, there must be evidence that harassment or discrimination did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under FECA. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his allegations with probative and reliable evidence.<sup>23</sup> Appellant submitted a statement from Mr. Diaz, a former coworker, who contended that appellant told him that his supervisors and coworkers were messing with him, questioning him on his actions at work, making fun of his speech, and passing around drawings to make fun of him. There is no corroborating evidence to establish that appellant's supervisors and coworkers actually engaged in this conduct. Mr. Diaz' statement is not specific as to precise time and place and it is based on information told to him by appellant, as opposed to any firsthand knowledge.

The record also indicates that appellant filed an EEO complaint. However, evidence that the employee filed a grievance or EEO complaint against the employing establishment does not, by itself, establish that workplace harassment, discrimination, or unfair treatment occurred.<sup>24</sup>

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<sup>19</sup> Furthermore, management of work assignments and schedules are administrative functions of the employing establishment and not duties of the employee. *See supra* note 13.

<sup>20</sup> *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

<sup>21</sup> *See Charles D. Edwards*, *supra* note 15.

<sup>22</sup> *See Joe M. Hagewood*, 56 ECAB 479 (2005) (while witness statements agreed that the supervisor and appellant argued, the statements did not contain a detailed account of what was stated. Without a detailed description of the specific statements made, a compensable employment factor was not established).

<sup>23</sup> *F.H.*, Docket No. 13-294 (issued April 12, 2013).

<sup>24</sup> *See Charles D. Edwards*, *supra* note 15 (grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred).

Appellant has not provided any evidence to support that any specific adverse findings were made against the employing establishment with regard to the claimed incidents at issue.

Appellant alleged that his supervisor violated his HIPAA rights when he spread around the office that appellant was losing his skills. There is no evidence to establish that appellant's supervisor spread appellant's private medical information. As explained, a claimant must establish a factual basis for the claim by supporting his allegations with probative and reliable evidence.<sup>25</sup>

On appeal, appellant argues that the allegations made were truthful and that it would be impossible for him to produce the evidence required. As explained, it is the claimant's burden to provide factual evidence to substantiate his claim. Furthermore, even when an allegation is accepted as true it still may not amount to a compensable work factor within the meaning of FECA. Appellant has not established any compensable work factors as a cause of his claimed conditions. As such the Board does not need to evaluate the probative value of the medical evidence submitted in support of the claim.<sup>26</sup>

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish an emotional condition causally related to compensable factors of his employment.

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<sup>25</sup> *F.H.*, Docket No. 13-294 (issued April 12, 2013).

<sup>26</sup> See *Lori A. Facey*, 55 ECAB 217 (2004).



**ORDER**

**IT IS HEREBY ORDERED THAT** the October 29, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 15, 2016  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board